IN THE

Supreme Court of the United States

No. 674

October Term, 1928

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, ET AL.,

Appellants,

vs.

THE MAUMEE VALLEY ELECTRIC COMPANY,

Appellee.

On Appeal From the District Court of the United States, Southern District of Ohio, Eastern Division

MOTION OF APPELLANTS TO ADVANCE

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HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, SUCCESSOR TO AND SUBSTITUTED FOR GEORGE F. SCHLESINGER, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, AND ROY E. DAVIS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO; THE VILLAGE OF MAUMEE, OHIO; THE VILLAGE OF WATERVILLE, OHIO; AND THE CITY OF TOLEDO, OHIO,

Appellants,

vs.

THE MAUMEE VALLEY ELECTRIC COMPANY,

Appellee.

MOTION OF APPELLANTS TO ADVANCE

Now come the appellants in the above entitled cause and move that this case be advanced for an early hearing.

In support of their motion appellants make a brief statement of the matter involved and the reasons relied upon for the advancement of the hearing of this cause.

STATEMENT OF MATTER INVOLVED

This cause is here on appeal from a decree of the District Court (three judges sitting) of the United States for the Southern District of Ohio by which appellant Kirk, an officer of the State of Ohio, was enjoined from draining the water from a portion of the Miami and Erie Canal in pursuance of Sections 14178 to 14178-12 inclusive, of the General Code of Ohio, enacted May 11, 1927, 112 Ohio Laws 360-363, on the ground that the performance by him of said duties would be the taking of property of the appellee without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States, and impaired obligations under certain leases and agreements of the State of Ohio leasing to the appellee water from the Miami and Erie canal used by appellee for hydraulic power, and an agreement resulting from the covenants of a deed from the State of Ohio to the City of Toledo conveying to it a part of the Miami and Erie Canal northerly of that part abandoned by the Act of May 11, 1927, in which deed it was agreed that the City of Toledo should compensate appellee for its rights under its leases if the City of Toledo should deprive the appellee thereof, by virtue of the Act of the General Assembly of Ohio, authorizing the execution of said deed enacted January 23, 1920. Like injunction against other appellants was ordered by the decree of the District Court. The aforesaid Act of the

General Assembly of Ohio, passed May 11, 1927, declared that said canal be abandoned, that all leases for canal or hydraulic purpose be null and void sixty days after the passage of the Act, and directed the Director of Highways of the State (appellant Kirk) to drain the water from the abandoned portion of the canal and to prevent the water of the Maumee River from flowing into or through the abandoned part of the canal; by virtue of Sections 2 and 3 of the aforesaid Act the State of Ohio reserved unto itself all title to lands and waters which at the time of the passage of the Act were the property of the State of Ohio occupied by any part of the Miami and Erie Canal, which further provided that the same should forever be held by the State of Ohio in fee simple, and held for the purpose of constructing upon said lands a highway.

Appellants contend that the aforesaid Act of the General Assembly of May 11, 1927, is valid, does not deprive the appellee of its property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution, and that said Act does not impair the obligations of any agreements of the State of Ohio, in violation of the Constitution of the United States, relying upon the principle: that the statutes of the State of Ohio authorizing the execution of said leases provided for certain conditions which for many years have been interpreted to mean that in leasing the surplus waters of the canals of the state there was a reservation of the right to resume the privilege of the use of the water whenever the state deemed it necessary for navigation purposes; that a subsequent statute granting a part of the canal for a public highway

amounted to a rescission of the lease; that such steps did not deprive the lessee of any rights without due process and without just compensation and are not void under the Constitution of the United States; and further that every lessee of power take his lease and put up his improvements with full notice of the reserved right on the part of the state to discontinue its canal and stop his supply of water.

Fox vs. Cincinnati, 104 U. S. 783, affirming
Fox vs. Cincinnati, 33 O. S. 492.
Hubbard vs. Toledo, 21 O. S. 379.
Elevator Co. vs. Cincinnati, 30 O. S. 629.
Voight vs. Railroad Co., 58 O. S. 123.

REASONS RELIED ON FOR ADVANCEMENT

Appellant, City of Toledo, on December 28, 1922, pursuant to an Act of the General Assembly of Ohio, passed on January 22, 1920, 108 Ohio Laws, Part 2, pages 1138 to 1141, inclusive, purchased the title to the canal lands, from a point in the City of Toledo southerly to the Maumee River side-cut, a distance of 45,683 feet. The conveyance made pursuant to the provisions of said Act which provided that the City of Toledo should pay to any lessees of the State of Ohio a fair compensation for the loss of water to which they are entitled in the event lessees are under the terms of said Act deprived of their water privileges.

The City of Toledo having proposed to withdraw the water from said canal, appellee herein, as the holder of the water power leases, in March, 1925, filed suit in

the United States District Court for the Northern District of Ohio, Western Division, to restrain the withdrawal of the water from the canal by the City of Toledo until the city shall have paid it its fair compensation for the loss of the water which it is entitled to receive in the event the city deprived it of the use of water, in accordance with the provisions of said Act. The District Court denied the injunction but upon appeal to the United States Circuit Court of Appeals the city was enjoined from withdrawing the water from the canal until it shall first pay the appellee a fair compensation for the loss of the water *to which it is entitled* under its leases.

> Maumee Valley Electric Co. vs. City of Toledo, 13 F. (2d) 98 (writ of certiorari denied October 25, 1926).

On May 11, 1927, the General Assembly of Ohio enacted Section 14178-14178-12, inclusive, which provides for the abandonment of the canal from the Maumee River side-cut southwesterly the full width to the point where the canal joins the Maumee River; that all existing leases of the state shall become null and void within sixty days from the taking effect of the Act; authorizes the Commissioners of Lucas County, also the legislative bodies of the Villages of Waterville and Maumee, apellants herein, to remove all existing bridges crossing said abandoned portion of said canal; and authorizes the Director of Highways of the state, appellant Kirk, and the Commissioners of Lucas County, appellants Davis, Farnsworth and Hoffman, to drain the water from the abandoned portion of the canal and to prevent the water

from the river from flowing into and through said abandoned part of the canal.

In view of the provisions of the foregoing Act, if the same are valid, no water can flow from the Maumee River northerly into the abandoned portion of the canal nor into the portion of the canal purchased by the City of Toledo; in such event no water can reach any of the points covered by any leases of appellee, and lessee is not entitled to receive any water by virtue of said leases. Therefore City of Toledo would not be liable for compensation by virtue of the Act of January 22, 1920, 108 Ohio Laws, Part 2, 1138 to 1140, *supra*.

The City of Toledo on July 29, 1927, brought an action, Cause No. 107176, against the appellee in the Court of Common Pleas of Lucas County, Ohio, in which by virtue of the Act of January 22, 1920, it requested the court to determine the amount of compensation to appellee for its water privileges.

Appellee on August 10, 1927, brought a suit, Cause No. 107306, in the Court of Common Pleas of Lucas County, Ohio, to restrain the City of Toledo from proceeding with said Cause No. 107176 to fix compensation on the ground, among other things, that the city, in its petition in Case No. 107176, failed to allege or describe the rights of the appellee so sought to be appropriated. The judgment of the Court of Common Pleas of Lucas County, Ohio, in said cause enjoined the City of Toledo from proceeding with said action to assess the amount of compensation to the appellee on the ground that said petition in said Cause No. 107306 failed to describe the rights of appellee which appellants sought to appropriate and have valued for the purpose of fixing compen-

sation within the provision of the Act of January 22, 1920, 108 Ohio Laws, Part 2, pages 1138 to 1141, inclusive, which judgment provided that the city should have the right to file an amended petition in Cause Number 107176 showing the rights of appellee which it sought to appropriate and to have determined the amount of compensation.

But the City of Toledo was unable to set forth in said Cause No. 107176 what rights appellee had by virtue of its leases with the State of Ohio in view of the provisions of the Act of May, 1927, Section 14178 *et seq.* of the General Code of Ohio, which, if valid, declare void the leases of appellee, from which it necessarily follows, as has been shown, that no water will flow through the canal to the points covered by the leases of appellee and that appellee has no rights of any value.

On November 2, 1926, by a vote of the electors of the City of Toledo a bond issue of $800,000.00 was authorized for the purpose of paying the cost of such boulevard, but the city cannot proceed with said improvement until there has first been determined what rights the appellee has pursuant to its various leases and the value of such rights.

That the City of Toledo is rapidly growing in a southwesterly direction; that the Villages of Maumee and Waterville, suburbs of Toledo, lie southwesterly from Toledo and are rapidly growing communities; that there is only one main highway (Broadway extended into River Road) leading from the central portion of the City of Toledo southwesterly toward the Villages of Maumee and Waterville and extending from the central portion

of the City of Toledo to the southerly and southwesterly portions thereof; that the increased amount of traffic, due to the use of motor vehicles, creates congestion upon said highway; that at about three miles from the central portion of the city the tracks of the Wabash Railroad Company cross said highway at grade creating further congestion; that the city intends to eliminate said grade crossing, but has no other thoroughfare available to divert traffic during the course of such grade elimination construction.

That appellants, the State of Ohio and the Commissioners of Lucas County, intend to construct a highway upon the portion of the canal abandoned by the Act of May, 1927, Sections 14178 *et seq.*, and that they are unable to proceed with the construction of such highway until the controversies involved in the issues of the case at bar are determined; that such highway will be important as it is contemplated that it will proceed in a southwesterly direction through the municipalities of Napoleon and Defiance and from there along the Miami and Erie Canal through various municipalities to a southerly terminal in the City of Cincinnati.

Section 949 of the Revised Statutes of the United States provides:

> "When a state is a party, * * * in any suit in a court of the United States, such state * * * shall be entitled, on showing sufficient reason, to have the cause heard any time after it is docketed, in preference to any civil cause pending in such court between private parties."

It is manifest that the State of Ohio is the real party to this cause even though Harry J. Kirk, as superinten-

dent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, is the appellant, for the State of Ohio is *ex cathedra* through such officer enjoined from carrying out the provisions of the aforesaid Act of the General Assembly. That this is in effect a suit against the state is shown by a recent decision of this court in the case of *State Highway Commission of Wyoming vs. Utah Construction Company*, decided January 2, 1929, and found in the Advance Sheets of the Official Reports of this court including decisions from December 11, 1928, to January 2, 1929, in which the first headnote is:

> "Suit against the State Highway Commission and its members on a road construction contract executed in the name and on behalf of the state, held in effect a suit against the state."

As is readily seen from the foregoing statement, the State of Ohio, if the contention of appellants is correct, is needlessly required to supply water to the abandoned portion of the Miami & Erie Canal, which necessarily works an unwarranted inconvenience and expense, together with a responsibility, upon the State of Ohio.

Brief of appellants is in course of preparation and subject to completion of the printed record it is confidently hoped by counsel that it will be filed before the submission of this motion.

CONCLUSION

According to the information of counsel, if this cause is not advanced the same will not be reached for argument until October of 1929. We therefore, in con-

clusion, desire to urge the court to assign this cause for hearing prior to the summer recess of the court.

Respectfully submitted,

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